

## High Court challenges to enforceability of Irish adjudication decisions have an increasingly uphill battle

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The Construction Contracts Act, 2013 ("the 2013 Act") came into effect in July 2016 introducing the right for a party to a construction contract to refer a "payment dispute" at "any time" to an adjudicator for a binding decision. The right is set out in s 6 of the 2013 Act and provides for a 28-day timeframe, usually extendable by a further 14 days, from the date of referral to the Adjudicator's decision. Crucially, the decision of the adjudicator is binding and enforceable in the same manner as an order of the Court, until the parties settle their dispute or the decision is referred to arbitration or court proceedings.

Though the adjudication process under the 2013 Act was initially under-utilised, there has been significant uptake in recent years. The Sixth [Annual Report of the Chairperson of the Construction Contracts Adjudication Panel](#), outlines that the number of referrals has continued to increase year-on-year, with 81 applications seeking the appointment of an Adjudicator being received between July 2021 and July 2022. This is in stark contrast to just 11 applications from July 2017 to July 2018.

Very few adjudications have come before the Courts, but those that have have consistently been enforced. The recent cases set out below provide a valuable insight into judicial attitudes towards adjudication.

### Principal Construction Limited v Beneavin Contractors Limited [2020] 199 MCA

This [decision](#) was the second instance of the High Court ruling in support of an adjudicator's decision, following the case of *Gravity Construction v Total Highway Maintenance Ltd [2021] IEHC 19*. After completing their works, Principal issued an adjusted final account of €989,730.91.

However, the contract administrator's final payment recommendation was that Principal owed Beneavin €116,309. At adjudication, Principal were awarded €643,635.98. On referral, the High Court enforced this award.

Amongst the Respondent's submissions was that the adjudicator lacked jurisdiction as the final certificate was not disputed within the time provided in the contract between the parties. However, Meenan J held that the adjudicator's jurisdiction derives from the 2013 Act, rather than any particular contract. Importantly, the Court held that the statutory rights conferred by the 2013 Act cannot be contracted out of once a dispute is referred to an adjudicator.

The Court also held that, as in the UK, an adjudicator's decision may only be declared unenforceable due to a lack of jurisdiction or a breach of natural justice. Beneavin attempted to argue that the inclusion of the words "*if binding*" in s 6(11) of the 2013 Act makes it simpler in Ireland than in the UK to resist the enforcement of an adjudicator's decision, given that those words do not appear in the equivalent UK legislation. However, the Court held that the words "*if binding*" must be read subject to s 6(10), which states that "*[t]he decision of the adjudicator shall be binding until the payment dispute is finally settled by the parties*" and as such, the enforceability of an adjudicator's decision in Ireland follows the lead of the UK.

## John Paul Construction Limited v Tipperary Co-Operative Creamery Limited [2021] 262 MCA

In this case, the paying party sought to resist the enforcement of the adjudicator's award on two grounds. Firstly, they argued that the adjudicator failed to comply with the requirements of fair procedures and natural justice as he failed to consider the substantive defence put forward and also allowed the claimants to introduce a "*new claim*" during the adjudication. Secondly, they argued that the adjudicator purported to reopen an issue which had already been decided between the parties.

The above submissions were all dismissed by the Court on the facts, however the Court's decision included useful commentary regarding the legislative intent of the 2013 Act as well as the nature of adjudication under the 2013 Act. It was noted that the 2013 Act does not regard an adjudicator's decision as being final. Rather, it imposes a provisional obligation to make a payment. This obligation can then be either enforced or lifted following arbitration or court proceedings. This is known as the "*pay now, argue later*" principle.

As a result of the "*pay now, argue later*" principle, Simons J stated that "*the adjudication process will, of necessity, be less elaborate than conventional arbitration or litigation*". As the legislative intent of the 2013 Act is to facilitate speedy payment in the construction industry, it is necessary that the adjudicator come to a decision quickly. The Court held that the successful party will then be entitled to enforce the decision, while the unsuccessful party will have the

right to reargue the dispute in subsequent proceedings, be they arbitral or before the Court.

## McGurran Civils ROI Limited v K & J Townmore Construction Limited [2023] 142 MCA

This case was somewhat unique in that the Respondent formally challenged the application for leave to enforce but did not challenge the validity of either of the adjudicator's decisions. Rather, the Respondent sought reductions in the amount claimed by the Applicant, mainly in relation to the calculation of interest and the recoverability of VAT. The Respondent also complained that the Applicant did not send a formal solicitor's letter prior to the institution of proceedings.

The Applicant was granted leave to enforce the adjudicator's decisions. Simons J considered that the Respondent had not put forward any defence to most of the claim. Rather, they had sought "*to quibble in respect of minor matters*". As of the date that proceedings were issued, the Respondent owed approximately €80,000 pursuant to the adjudicator's decisions. The sum in dispute was roughly €3,000.

In relation to the Respondent's complaint that the Applicant had not sent a formal solicitor's letter in advance of issuing proceedings, Simons J held that such a failure on the part of the Applicant would only be relevant if the Respondent could say that they would have reacted to the letter in such a way as to obviate the need for legal proceedings. This did not arise in this case. The Applicant had made their intention to issue proceedings clear. Simons J also made the general point that the need to issue a warning letter must be seen in the context of the very tight timelines set out in the 2013 Act.

## DNCF LTD -v- Genus Homes LTD [2023] 159 MCA

In this most recent judgment of the High Court on the 2013 Act delivered on 11 August 2023, the adjudicator's decision was once again upheld and enforced. In doing so, Simons J considered the role and obligations of the adjudicator.

The works at the heart of the matter were completed in December 2022. In February 2023, the Respondent employer produced a final account assessment which showed a €1.6m overpay. The Respondent hoped to offset this figure against an outstanding payment of release of retention. The relevant certificate was provided to the adjudicator without a detailed breakdown of the relevant sums. Without an adequate explanation, the adjudicator declined to offset the figures. The Respondent alleged that the adjudicator had breached fair procedures by not requesting further and better particulars and as such did not properly consider their submission.

In finding that there was no breach of fair procedures, Simons J held that the Respondent had erred by implying that adjudication is "*an iterative process, whereby the adjudicator is under a*

*positive duty to invite the parties to elaborate upon their submissions"*. The onus was on the Respondent to submit sufficient evidence to substantiate their claim. Simons J referenced his own judgment in the above *John Paul Construction* case, in reasserting the need for adjudication to be expeditious. It was held that an adjudicator is entitled to make a decision on the basis of the material put forward by both parties and they are not obliged to enter into dialogue with a party or adduce further evidence.

## Conclusion

The case law clearly illustrates the judiciary's willingness to consistently enforce adjudication decisions, and be supportive of the truncated adjudication process which is essentially a documents only process and which does not carry the burdens of fair procedures and natural justice seen in litigation and arbitration. This willingness, coupled with the growing number of referrals to adjudication, represents a strong endorsement of the utility of the 2013 Act as well as construction adjudication in general.

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